

HR COMPLIANCE BULLETIN

FMLA Highlights

- Complications arising from the flu may constitute a serious medical condition under the FMLA, for an employee or a family member the employee is needed to care for.
- The FMLA does not require employers to provide leave for employees caring for dependents who have been dismissed from school or child care.
- When health care resources are overwhelmed, it may be difficult for employees to obtain verification that they are no longer contagious.

ADA Highlights

- Any employer plan to send workers home if they show signs of illness must comply with laws prohibiting discrimination in the workplace on the basis of race, sex, age, color, religion, national origin, disability or veteran status.
- Employees with a disability may be excluded from the workplace if there is objective evidence that they pose a direct threat.

DOL Issues Guidance on COVID-19 and the FMLA

The U.S. Department of Labor has issued Q&As on the federal Family and Medical Leave Act (FMLA) and COVID-19 (the disease caused by the new coronavirus) and other health emergencies. The Q&As explain that under the FMLA, [covered](#) employers must provide eligible employees with job-protected, unpaid leave for specified [family and medical reasons](#), which may include the flu where complications arise. Employees on FMLA leave are entitled to the [continuation of group health insurance](#) coverage under the same terms as before they took leave.

The Q&As state, among other things, that the FMLA provides leave for an employee's serious health condition or to care for a family member's serious health condition, but does not provide leave for avoiding the workplace out of a fear of contracting a disease. The Q&As also provide information on the application of the Americans with Disabilities Act (ADA) to employee leave.

The Q&As recommend that employers encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home. They also encourage employees to consider flexible leave policies for their employees in these circumstances.

The DOL Q&As are reprinted in this Compliance Bulletin.

Action Steps

Employers covered by the FMLA and the ADA should review the Q&As to ensure their policies are compliant with the DOL's guidance.

In addition, employers should be on the alert for further agency guidance and information in this rapidly developing area.

COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers

If you or your employees are out with the flu or are caring for ill family members, check with the Department of Labor (DOL) for information on whether such leave is covered under the [Family and Medical Leave Act \(FMLA\)](#). Under the FMLA, [covered](#) employers must provide employees job-protected, unpaid leave for specified [family and medical reasons](#), which may include the flu where complications arise. Employees on FMLA leave are entitled to the [continuation of group health insurance](#) coverage under the same terms as existed before they took FMLA leave.

Which employees are eligible to take FMLA leave?

Employees are eligible to take FMLA leave if they work for a covered employer and:

- Have worked for their employer for at least 12 months;
- Have at least 1,250 hours of service over the previous 12 months; and
- Work at a location where at least 50 employees are employed by the employer within 75 miles.

Special hours of service requirements apply to airline flight crew employees and to breaks in service to fulfill National Guard or Reserve military service obligations pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA). (See the U.S. Department of Labor [Wage and Hour Division](#) or call 1-866-487-9243 for additional information on FMLA.)

Must an employer grant leave to an employee who is sick or who is caring for a family member who is sick?

An employee who is sick or whose family members are sick may be entitled to leave under the FMLA under certain circumstances. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons. This may include the flu where complications arise that create a “serious health condition” as defined by the FMLA. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period.

Workers who are ill with pandemic influenza or have a family member with influenza are urged to stay home to minimize the spread of the pandemic. Employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees.

Can an employee stay home under FMLA leave to avoid getting pandemic influenza?

The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA. Employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

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What legal responsibility do employers have to allow parents or caregivers time off from work to care for the sick or children who have been dismissed from school?

Covered employers must abide by the FMLA as well as any applicable [state FMLA laws](#). An employee who is sick, or whose family members are sick, may be entitled to leave under the FMLA. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons, which may include the flu where complications arise that create a “serious health condition” as defined by the FMLA.

There is currently no federal law covering non-government employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents who have been dismissed from school or child care. However, given the potential for significant illness under some pandemic influenza scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families. Remember that federal law mandates that any flexible leave policies must be administered in a manner that does not discriminate against employees because of race, color, sex, national origin, religion, age (40 and over), disability or veteran status.

Is an employer required by law to provide paid sick leave to employees who are out of work because they have pandemic influenza, have been exposed to a family member with influenza or are caring for a family member with influenza?

Federal law generally does not require employers to provide **paid leave** to employees who are absent from work because they are sick with pandemic flu, have been exposed to someone with the flu or are caring for someone with the flu, although pursuant to [Executive Order 13706](#), some federal contractors may be required to provide such leave to employees under certain circumstances, such as if the employee or a family member is sick with the flu or seeking care related to the flu. Certain state or local laws may have different requirements, which should be independently considered by employers when determining their obligation to provide paid sick leave.

If the leave qualifies as FMLA-protected leave, the statute allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances. Employers should encourage employees who are ill with pandemic influenza to stay home and should consider flexible leave policies for their employees.

May employers send employees home if they show symptoms of pandemic influenza? Can the employees be required to take sick leave? Do they have to be paid? May employers prevent employees from coming to work?

It is important to prepare a plan of action specific to your workplace, given that a pandemic influenza outbreak could affect many employees. This plan or policy could permit you to send employees home, but the plan and the employment decisions must comply with the laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, disability or veteran status. It would also be prudent to notify employees (and if applicable, their bargaining unit representatives) about decisions made under this plan or policy at the earliest feasible time.

Your company policies on sick leave and any applicable employment contracts or collective bargaining agreements would determine whether you should provide paid leave to employees who are not at work. If the leave qualifies as

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FMLA-protected leave, the statute allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances. (See the U.S. Department of Labor [Wage and Hour Division](#) for additional information or call 1-866-487-9243 if you have any questions.)

Remember when making these decisions to exclude employees from the workplace, you cannot discriminate on the basis of race, sex, age (40 and over), color, religion, national origin, disability, union membership or veteran status. However, you may exclude an employee with a disability from the workplace if you:

- Obtain objective evidence that the employee poses a direct threat (i.e. significant risk of substantial harm); and
- Determine that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat.

(See the U.S. Equal Employment Opportunity Commission's [Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act](#) for additional information.)

May an employer require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam or remain symptom-free for a specified amount of time before returning to work?

Yes. However, employers should consider that during a pandemic, health care resources may be overwhelmed and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious.

During a pandemic health crisis, under the [Americans with Disabilities Act](#)* (ADA), an employer would be allowed to require a doctor's note, a medical examination or a time period during which the employee has been symptom-free before it allows the employee to return to work. Specifically, an employer may require the above actions of an employee where it has a reasonable belief—based on objective evidence—that the employee's present medical condition would:

- Impair their ability to perform **essential job functions** (i.e., fundamental job duties) with or without reasonable accommodation; or
- Pose a **direct threat** (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

In situations in which an employee's leave is covered by the FMLA, the employer may have a uniformly applied policy or practice that requires all similarly situated employees to obtain and present certification from the employee's health care provider that the employee is able to resume work. Employers are required to notify employees in advance if the employer will require a [fitness-for-duty certification](#) to return to work. If state or local law, or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.

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May employers change their paid sick leave policy if a number of employees are out and they cannot afford to pay them all?

Federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if it is done in a manner that does not discriminate between employees because of race, sex, age (40 and over), color, religion, national origin, disability or veteran status. Be sure also to consult state and local laws.

In addition, you should consider that, if your workforce is represented by a labor union and the collective bargaining agreement covers sick leave policies, you may be limited in either the manner in which you change the policy or the manner of the changes themselves because the collective bargaining agreement would be controlling. In a workplace without a collective bargaining agreement, employees may have a contractual right to any accrued sick leave, but not future leave.

Your sick leave policy also has to follow the requirements of the FMLA (if your employees are covered by the Act), and it needs to be consistent with federal workplace anti-discrimination laws, such as the [Americans with Disabilities Act](#) (ADA). (See the U.S. Department of Labor, [Wage and Hour Division](#) or call 1-866-487-9243 for additional information on FMLA. See the [U.S. Equal Employment Opportunity Commission](#) or call 1-800-669-4000 if you have questions on ADA.)

If an employer temporarily closes its place of business because of an influenza pandemic and chooses to lay off some but not all employees, are there any federal laws that would govern this decision?

The federal laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin or disability may apply. (See the [U.S. Equal Employment Opportunity Commission](#) (EEOC) or call 1-800-669-4000 if you have questions.) Other specific federal laws that prohibit discrimination on these or additional bases may also govern if an employer is a federal contractor or a recipient of federal financial assistance.

Additionally, the Worker Adjustment and Retraining Notification (WARN) Act helps ensure advance notice in cases of qualified plant closings and mass layoffs. For more information about the WARN Act, see <https://www.dol.gov/agencies/eta/layoffs/warn>.

You may also not discriminate against an employee because the employee has requested or used qualifying FMLA leave. (See the U.S. Department of Labor, [Wage and Hour Division](#) for additional information or call 1-866-487-9243 if you have questions.)

In addition, you may not discriminate against an employee because he or she is a past or present member of the United States uniformed service. (See the U.S. Department of Labor, [Veterans' Employment and Training Service](#) for additional information or call 1-866-889-5627 if you have questions.)

Some employees may not be able to come to work because they have to take care of sick family members. May an employer lay them off?

It depends. If an employee is **covered and eligible** under the FMLA and is needed to care for a spouse, daughter, son or parent who has a serious health condition, then the employee is entitled to up to 12 weeks of **job-protected**, unpaid leave during any 12-month period. Some states may have similar [family leave laws](#). In those situations, covered employers must comply with the federal or state provision that provides the greater benefit to their employees. (See the

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U.S. Department of Labor, [Wage and Hour Division](#) for additional information or call 1-866-487-9243 if you have questions.)

In lieu of laying off employees in this situation, we would encourage you to consider other options, such as telecommuting, and to prepare a plan of action specific to your workplace.

What types of policy options do employers have for preventing abuse of leave?

Both the FMLA and the [Americans with Disabilities Act](#) affect the provision of leave.

Under the FMLA, employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave **when the need is foreseeable** and such notice is practicable. In addition, employers may require employees to provide:

- Medical certification supporting the need for leave due to a serious health condition affecting the employee or a spouse, son, daughter or parent, including periodic recertification;
- Second or third medical opinions (at the employer's expense);
- Periodic reports during FMLA leave regarding the employee's status and intent to return to work; and
- Consistent with a uniformly applied policy or practice for similarly situated employees, a fitness-for-duty certification. (Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.) (See also: “May an employer require an employee who is out sick with pandemic influenza to provide a doctor’s note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?”)

The FMLA also allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances. (See the U.S. Department of Labor [Wage and Hour Division](#) for additional information on the FMLA or call 1-866-487-9243 if you have questions.)

*Under the [Americans with Disabilities Act](#), qualified individuals with disabilities may be entitled to unscheduled leave, unpaid leave or modifications to the employer sick leave policies as “reasonable accommodations.” These are modifications or adjustments to jobs, work environments, or workplace policies that enable qualified employees with disabilities to perform the essential functions (i.e., fundamental duties) of their jobs and have equal opportunities to receive the benefits available to employees without disabilities. (See the U.S. Equal Employment Opportunity Commission’s [Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act](#) for additional information.)

For further information about coronavirus, please visit the HHS’s [Centers for Disease Control and Prevention](#).

Source: [U.S. Department of Labor](#)